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No. 118 Original

In The

Supreme Court of the United States

October Term, 1990

UNITED STATES OF AMERICA,

Plaintiff

v.

STATE OF ALASKA,

Defendant

On Motion For Leave To File Bill Of Complaint

MEMORANDUM OF STATE OF ALASKA

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STATEMENT

This memorandum is submitted in response to a motion by the United States for leave to file an original bill of complaint against the State of Alaska. The question presented is whether the United States Army Corps of Engineers can require, as a pre-condition to issuing a permit to a third party to construct an artificial structure offshore, that the State in which the structure will be located waive its right to submerged lands to which it otherwise would be entitled under the Submerged Lands Act of 1953, 43 U.S.C. 1301-1315. Alaska does not oppose the United States' motion.

In the Submerged Lands Act, Congress granted to the coastal States ownership of the submerged lands within their boundaries, 43 U.S.C. 1311(a) and (b), which generally speaking are three geographical miles from the "coast line." 43 U.S.C. 1301(b) and 1312; *see United States v. Louisiana*, 363 U.S. 1, 20-25 (1960).[1] The "coast line" is defined in pertinent part as the "line of ordinary low water along that portion of the coast which is in direct contact with the open sea." 43 U.S.C. 1301(c). Artificial structures with a low water mark ordinarily extend a State's coastline[2] for Submerged Lands Act purposes. *See, e.g., United States v. California*, 432 U.S. 40, 41-42 (1977); *cf. United States v. Louisiana*, 389 U.S. 155, 158 (1967) ("artificial jetties are a part of the coastline for measurement purposes"); *compare United States v. California*, 447 U.S. 1 (1980) (open-piling piers do not extend the coastline).

Corps of Engineers' approval for such a structure is required by sections 9 and 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 401 and 403. In deciding whether to approve such a project, the Corps of Engineers considers "the probable impacts, including cumulative impacts, of the proposed activity and its

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[1] The grants to Texas and Florida (along its Gulf coast) extend to nine geographical miles. *United States v. Louisiana*, 363 U.S. at 64 (Texas); *United States v. Florida*, 363 U.S. 121 (1960).

[2] Although the Submerged Lands Act uses the two words "coast line," this Court has consistently used the single word "coastline." *E.g., United States v. California*, 381 U.S. 139 (1965) (passim). We employ the Court's usage in this memorandum.

intended use on the public interest." 33 C.F.R. 320.4(a)(1) (1990) (in part). Where a proposed project may extend the coastline for Submerged Lands Act purposes, "coordination with the Attorney General and the Solicitor of the Department of the Interior is required before final action is taken." 33 C.F.R. 320.4(f) (1990) (in part).

In 1982, the City of Nome (an independent municipality incorporated in 1901, well before Alaska was admitted to the Union in 1959) applied for a Corps of Engineers permit to construct a new solid fill causeway that would have extended Alaska's coastline for Submerged Lands Act purposes. As a consequence of the required "coordination with the Attorney General and the Solicitor of the Department of the Interior,"[3] Alaska was informed by the Solicitor that the City of Nome's application would not be granted unless Alaska waived any Submerged Lands Act claims that it might make following construction of the causeway.[4]

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[3] Under the Outer Continental Shelf Lands Act, 43 U.S.C. 1331-1356, the Department of the Interior administers the federal outer continental shelf, which lies immediately seaward of the lands granted to the States under the Submerged Lands Act. See 43 U.S.C. 1331(a) and (b) and 1334.

[4] Alaska was admitted to the Union on January 3, 1959, Presidential Proclamation 3269 (January 3, 1959), 24 Fed. Reg. 81 (1959), six years after the Submerged Lands Act was enacted. The Submerged Lands Act was made applicable to Alaska in section 6(m) of the Alaska Statehood Act, P.L. 85-508, 72 Stat. 339 (1958). See 42 U.S.C. note preceding section 21.

On May 9, 1984, Alaska filed with the Corps of Engineers a disclaimer[5] in which it (1) waived such potential claims, but (2) specified that "[t]his disclaimer becomes ineffective and without force and effect upon a final determination by a court of competent jurisdiction in any appropriate action that the Corps of Engineers does not have the legal authority to require such a disclaimer before issuing a permit for a project which might affect the coastline."[6]

This is such an "appropriate action." Resolution of the case will determine whether Alaska or the United States owns certain submerged lands in Norton Sound on Alaska's west coast. It also will resolve whether the Corps of Engineers has the legal authority to condition the granting of permits to third parties on waivers by the States of statutory entitlements.

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[5] The disclaimer is reprinted as the Appendix to the United States' Motion for Leave to File Complaint, Complaint, and Brief in Support of Motion.

[6] See United States' Motion for Leave to File Complaint, Complaint, and Brief in Support of Motion, Appendix at 4a. Alaska first questioned the Corps of Engineers' authority to demand such waivers in 1980. See 1980 Inf. Op. Atty Gen. (Oct. 30; file no. J-66-477-80)

ARGUMENT

A. THE UNITED STATES' PROPOSED COMPLAINT PRESENTS A CASE OR CONTROVERSY.

The United States devotes a substantial portion of its Brief in Support of Motion to argument on the merits of the case, contending in effect that this Court has already approved the practice followed by the Corps of Engineers.[7] That argument is premature – after all, leave to file the complaint has not yet been granted – and is irrelevant to the motion before the Court.

The United States having opened the door, however, Alaska is constrained to respond briefly. In doing so at this early stage, it will at least be clear that the United States' proposed complaint, when answered by Alaska, will present a true case or controversy worthy, in the opinion of both the United States and Alaska, of this Court's original jurisdiction.

Alaska does not question that the United States has constitutional authority to prevent States from unilaterally extending their coastlines and their Submerged Lands Act grants "through its power over navigable waters." *United States v. California*, 381 U.S. 139, 177 (1965). Indeed, Congress expressly reserved that Commerce Clause power[8] in the Submerged Lands Act. 43 U.S.C. 1314(a).

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[7] United States' Brief in Support of Motion at 2-5.

[8] United States Constitution, art. I, § 8, cl. 3; *see Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

But it is one thing to say that the United States has constitutional authority to do something, and quite another to say that Congress has both exercised that authority and delegated it to the federal executive, as the United States claims here. Nothing in the Rivers and Harbors Appropriation Act expressly authorizes the Corps of Engineers to condition the granting of a third-party permit on a waiver by a State of its statutory rights under the Submerged Lands Act. The former Act "was obviously intended to prevent obstructions in the Nation's waterways." *Wyandotte Co. v. United States*, 389 U.S. 191, 201 (1967).

And it is unlikely that Congress would have authorized the Corps of Engineers to condition the granting of a permit under that Act on resolution of a title dispute over which the third-party applicant has no control. Such a practice is patently unfair to the third-party applicant. By requiring such a waiver as a condition precedent to granting a permit, the Corps of Engineers effectively holds the innocent third-party applicant hostage in a controversy between the State and the federal government.

The Corps of Engineers, in its own regulations implementing its Rivers and Harbors Appropriation Act authority, acknowledges that disputes over land title are not properly considered as part of the public interest review process: "The dispute over property ownership will not be a factor in the Corps public interest decision." 33 C.F.R. 320.4(g)(6) (1990) (in part). Although apparently directed at situations where there is a dispute over title to the land that will actually be used for a project, that regulation by its terms requires the Corps of Engineers to

disregard any dispute over land title when making its public interest determination. Absent a waiver by the State, however, the existence of the title dispute between the State and the federal government leads to denial of the third party's application for reasons wholly unrelated to the purpose of the Rivers and Harbors Appropriation Act, protection of navigation.

Most significantly, if the Corps of Engineers succeeds in obtaining a State waiver of Submerged Lands Act claims by withholding approval of a third party's permit application, two separate coastlines are established, one for Submerged Lands Act purposes and a different one for purposes of the United States' international relations. That result, however, is a legal impossibility. Under the Act, as interpreted by this Court, the coastline for Submerged Lands Act purposes is the same as the coastline for purposes of the United States' international relations.

In *United States v. California*, 381 U.S. at 165, this Court incorporated the definitions of the Convention on the Territorial Sea and Contiguous Zone, T.I.A.S. 5639, 15 U.S.T. (Pt. 2) 1606 (1958), into the Submerged Lands Act. As the Court explained, "[t]his establishes a single coastline for both the administration of the Submerged Lands Act and the conduct of our future international relations (barring an unexpected change in the rules established by the Convention)." *Id.* Neither the Corps of Engineers nor a coastal State, by agreement or otherwise,[9] can

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[9] In the *California* case, the Court noted that "the Special Master recognized that the United States, through its control over navigable waters, had power to protect its interests from

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effectively amend the Submerged Lands Act to produce two coastlines, one for international relations and a different one for Submerged Lands Act purposes.[10] Only Congress has that power. Yet two coastlines is precisely

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encroachment by unwarranted artificial structures, and that the effect of any future changes [to the coast line as a consequence of such a structure] could thus be the subject of agreement between the parties." 381 U.S. at 176. The Special Master's Report in that case was filed, however, in November of 1952, 344 U.S. 872 (1952), six months before the Submerged Lands Act was enacted in 1953 and long before this Court incorporated the Convention's definitions into the Act in the 1965 *California* case. As a purely legal matter, the issue now is governed by the Submerged Lands Act and the Convention, any "agreement" between the parties notwithstanding.

In any event, no such "agreement" was reached here. In fact, quite the opposite is true. Alaska's disclaimer expressly stated that Alaska believed the Corps of Engineers did not have the authority to require a waiver, and that the disclaimer would not have been executed but for the Corps of Engineers' refusal to grant a permit to the City of Nome in the absence of a waiver. See United States' Motion for Leave to File Complaint, Complaint, and Brief in Support of Motion, Appendix at 2a.

[10] This does not preclude a State from arguing, as Alaska argues in *United States v. Alaska*, No. 84, Original, 442 U.S. 937 (1979) (leave to file complaint granted), that the coastline now asserted by the United States in its international relations is not the coastline which the United States asserted at the time the Submerged Lands Act grant vested in the State. *Cf. United States v. Louisiana*, 394 U.S. 11, 73-74 n.97 (1969) (Louisiana not precluded from arguing that earlier United States' policy for delimiting coastline for international relations purposes controlled delimitation of coastline for Submerged Lands Act purposes).

what the Corps of Engineers seeks to accomplish, without Congressional authority under either the River and Harbors Appropriation Act or the Submerged Lands Act, through the waiver policy at issue here.

In short, the United States' proposed complaint, when answered by Alaska, will present a true case or controversy. As we now show, that case or controversy is an appropriate one for resolution under this Court's original jurisdiction.

B. THIS IS AN APPROPRIATE CASE FOR EXERCISE OF THE ORIGINAL JURISDICTION OF THIS COURT.

Alaska recognizes that this Court exercises its original jurisdiction "sparingly" and is "particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim."[11] Alaska nonetheless agrees with the United States that this is an appropriate case for the exercise of this Court's original jurisdiction.[12]

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[11] *United States v. Nevada*, 412 U.S. 534, 538 (1973). There is no question that another adequate forum exists: Alaska could invoke district court jurisdiction under 28 U.S.C. 1331(a), 1346(f), and 2409a; the United States could file in the district court under 28 U.S.C. 1331(a) and 1346.

[12] United States Brief in Support of Motion at 6-7.

At the outset, this Court has original jurisdiction over the subject matter of the dispute, and is the most appropriate forum for its resolution: "coastal boundary disputes are appropriately brought as original actions in this Court."[13]

In addition, the existence of the dispute between Alaska and the United States currently precludes exploration and development of what may be significant mineral deposits in the area, which is contrary to congressional policy if the lands belong to the United States.[14] Granting the United States' motion for leave to file a complaint will permit Alaska and the United States to enter into an interim agreement for immediate leasing of the disputed lands under their respective statutory authorities.[15]

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[13] *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 277 n.6 (1982). As the United States points out in its Brief in Support of Motion at 7, all but one of the disputes between a State and the United States over ownership of submerged lands have been resolved by original actions in this Court. The exception was *United States v. Alaska*, 422 U.S. 184 (1975), where the Court stated that "[w]e are not enlightened why the United States chose not to bring an original action in this Court." *Id.* at 186 n.2.

[14] Congress has declared that "expeditious and orderly development" of the federal Outer Continental Shelf is a national policy. 43 U.S.C. 1332(3).

[15] Alaska Statute 38.05.137; 43 U.S.C. 1336. Alaska and the United States entered into such an agreement with respect to disputed lands at issue in No. 84, Original. That case is still pending before a special master.

But the action has much broader implications than merely determining Alaska's and the United States' rights to certain lands. The Corps of Engineers' policy of demanding a State waiver before authorizing a third party to construct a project which would extend the coastline is nationwide in scope. It puts all third parties proposing such projects at risk of becoming unwilling victims of the proprietary battles between the States and the federal government. It affects all 23 coastal States equally.

More importantly, the practice has the potential to thwart the congressionally declared national policy "to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations."[16] Many projects now subject to the State waiver requirement are designed specifically to preserve and protect erodible beaches[17] or to protect and make safe the entrances to harbors.[18] Similar projects, and others like the City of Nome port facilities here, may not be built in the future as a consequence of the Corps of Engineers' policy since a failure by a State to waive its claims precludes construction of the project.

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[16] 16 U.S.C. 1452(1).

[17] E.g., the groins listed in the Second Supplemental Decree in *United States v. California*, 432 U.S. at 41-42.

[18] E.g., the jetties and breakwaters listed in *United States v. California*, 432 U.S. at 41-42, and the two jetties noted in *Texas v. Louisiana*, 426 U.S. 465, 469 n.3 (1976).

Most significantly, the Corps of Engineers' policy of demanding State waivers conflicts with this Court's incorporation of international law principles into the Submerged Lands Act to ensure that there is a single coastline for purposes of both that Act and the United States' international relations.

For all of these reasons, Alaska believes that this Court must resolve the question of the Corps of Engineers' authority to require a State to waive any Submerged Lands Act claim it might make before the Corps will issue a permit to a third party for construction of an offshore artificial structure that would have the effect of extending the coastline. The United States' motion for leave to file an original bill of complaint should accordingly be granted.

CONCLUSION

For the reasons stated above, Alaska respectfully requests that this Court grant the United States' motion for leave to file the complaint, that Alaska be permitted to answer, and that this Court direct further proceedings as appropriate.[19]

DATED: March, 1991.

Respectfully submitted,

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[19] Alaska agrees with the United States that "the issue is purely one of law," United States' Brief in Support of Motion at 6, and that trial court proceedings either in the district court or before a special master are not required. *Compare California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 278 (1982): "No essential facts being in dispute, a special master was not appointed and the case was briefed and argued."